UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION d/b/a RIO ALL-SUITES HOTEL AND CASINO,

Employer,

and **Case 28-CA-060841**

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO,

Union.

AMICUS BRIEF OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 304

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INTEREST OF THE AMICUS

The International Brotherhood of Electrical Workers, Local Union 304, is located in Topeka, Kansas, and represents approximately 2,100 members across twenty-three contracts. This local also represents approximately 415 non-dues paying covered employees. The more than 2,500 employees that the *Amicus* represents across the state of Kansas work in the utility industry in power plants, rural electric cooperatives, municipalities and line construction. Many of the twenty-three contracts administered by the *Amicus* have multiple work sites which are spread out across the state of Kansas. This is especially true under one of the contracts originally negotiated in 1938 and still maintained today with two separate companies – Wester Energy and Kansas Gas Service.

The most prevalent form of communication utilized by these companies and their employees is e-mail through a company e-mail system. Job bids, work schedules, policy changes and nearly every other item required to be communicated to the workforce is done so through the company e-mail system. For many employees who are assigned to perform work in rural areas, and some are assigned to areas that cover 400 square miles, e-mail is the only way to communicate with management and fellow employees. Additionally, all work vehicles have undergone changes in technology and are now equipped with computers. This has virtually eliminated radio communication at each of these companies. Without question, company e-mail systems have become the nearly only way of communicating with employees.

Given the status of these contracts and the large mostly rural areas that the employees that the *Amicus* represents, it is clear that the *Amicus* has a major stake in the outcome of this decision. The ability for the *Amicus* to effectively advocate for and represent these employees – both dues paying and non-dues paying – will be severely damaged. Additionally, the

overturning of *Purple Communications* and the decisions that followed it will severely restrict the ability for these employees to engage in their Section 7 protected rights.

INTRODUCTION

On August 1, 2018, the Board solicited the parties of the above-referenced case and interested parties to submit briefs addressing the following questions:

(1) should the Board adhere to, modify, or overrule *Purple Communications*;

(2) if you believe the Board should overrule *Purple Communications*, what standard should the Board adopt in its stead? Should the Board return to the holing of *Registered Guard* or adopt some other standard;

(3) If the Board were to return to the holding of *Registered Guard*, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so, should the Board specify such circumstances or leave them to be determined on a case-by-case basis;

(4) The policy at issue in this case applies to employees' use of the Respondent's "[c]omputer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should the standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, postings on social media) when made by employees using employer-owned equipment?

For the reasons that follow, this *Amicus* firmly believes that the precedent established in *Purple Communications* should be retained and the Board should not return to the precedent of *Registered Guard* or adopt any new standard in-between. This *Amicus* also firmly agrees with the dissent in the Board's August 1, 2018, decision that extending the decision outside the scope of this case and applying it to computer resources beyond e-mail moves beyond agency adjudication and into agency rulemaking. Should the Board decide it wants to extend its holding beyond email systems, it should do so through the appropriate rulemaking process, not rush to judgment by backdooring new policy through the adjudication process.

SUMMARY OF ARGUMENT

The framework established by *Purple Communications* is consistent with United States Supreme Court precedent set by *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) where the Court unambiguously held that an employer's right to control use of their real property is not absolute. *Id*. at 797-98, 802 n.8. The Court further clarified this issue in *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1987) and *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) where it stated that the workplace "is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees" and banning such communications would seriously dilute Section 7 rights. *Id*. at 491; *Id*. at 325. A return to the *Registered Guard* standard would put the Board in conflict with this Supreme Court precedent

The Board also has standing precedent finding that rules that explicitly restricts Section 7 rights are unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Even where rules don't explicitly restrict Section 7 conduct can be found to be unlawful if employees would reasonably construe the rule to do so. *Id*. at 647; *Hyundai American Shipping Agency*, 357 NLRB 860, 861 (2011); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf'd* 203 F. 3d 52 (D.C. Cir. 1999). The Board has also stated that where "an employer . . . that permits some, but not all, nonbusiness email usage risks violating the Act if its restrictions are overbroad or ambiguous (i.e., leaving employees guessing at their peril what portion of their protected conduct was permitted). *See Costco Wholesale Corp.*, 358 NLRB 1100, 1101 fn. 6 (2012)." *Hyundai* 357 NLRB at 862.

Should the Board overrule *Purple Communications* and return to *Registered Guard* or a similar standard and attempt to create exceptions to that standard, the Board will place employees in jeopardy by forcing them to be test cases to determine what carveouts may or may

not be acceptable. Unlike when an employer chooses to be a test case and voluntarily funds the litigation that follows it, employees attempting to exercise their Section 7 rights will be forced into a situation where they are disciplined – or possibly fired – for such conduct and forced to undergo financial and reputational harm while their case works its way through the system. The Board should not put the American workforce in this situation without substantial justification for doing so.

Purple Communication was carefully considered after extensive evidence was provided demonstrating the massive change in workplace technology and communication where email has become "the most pervasive form of communication in the business world" and a "natural gathering place" extensively used by the employees to communicate among themselves. 361 NLRB at 1055, 1057. As Member Pearce points out, "[n]othing has changed since the issuance of *Purple Communications* to warrant re-examination of this precedent." Additionally, as Member McFerran points out, there have been no intervening adverse judicial decisions and the Respondent has not identified any change in workplace trends or presented any empirical evidence to suggest that current Board precedent that "will create significant and intractable challenges for employees, unions, employers and the NLRB" as Member Miscimarra argued in dissent in *Purple Communications*. 361 NLRB at 1086.

Simply put, there is no justification to place the American workforce in peril while the Board spends years attempting to carve out exceptions to a blanket standard that stands in conflict with United States Supreme Court precedent as well as standing Board precedent. The Board should retain *Purple Communication* as Board precedent and allow employers to establish justified exceptions as deemed necessary through the showing of empirical evidence. To do

otherwise simply politicizes the Board and jeopardizes its longstanding effort to focus its decisions on legal precedent, not shifting political views.

ARGUMENT AND AUTHORITIES

I. SUPREME COURT PRECEDENT DIRECTLY CONTROLS THIS CASE – IN FAVOR OF THE *PURPLE COMMUNICATIONS* FRAMEWORK – AND AGAINST THE RETURN TO *REGISTERED GUARD* OR A SIMILAR STANDARD

The Respondent in this case, while providing no empirical evidence to support its request, wishes to overturn carefully considered and balanced Board precedent which falls within the confines of longstanding United States Supreme Court precedent. The seeking to return to the previous standard requests the Board to ignore a massive body of empirical evidence and deviate from this directly controlling Supreme Court precedent in favor of a conflicting standard in *Registered Guard*. This request would have the additional effect of creating an everchanging sea in which employees will be forced to navigate to ascertain where their Section 7 rights begin and end. Thousands of American workers will receive discipline – including termination – for conduct that the Board may later determine to be an exception to the *Registered Guard* standard.

A. The Supreme Court's holding in *Republic Aviation* and *Beth Israel Hospital* require employers to permit employees to engage in protected communications in the workplace.

The Supreme Court's holding in *Republic Aviation* and *Beth Israel Hospital* require employers to permit employees to engage in protected communications in the workplace. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Court unambiguously held that an employer's right to control use of their real property is not absolute. *Id*. at 797-98, 802 n.8. The Court further clarified this issue in *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1987) and *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) where it stated that the workplace "is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various

options open to the employees" and banning such communications would seriously dilute Section 7 rights. *Id*. at 491; *Id*. at 325.

Contrary to *Registered Guard* which found that employees had no statutory right to use an employer's e-mail system for Section 7 matters, the Court in *Republic Aviation* was explicit in recognizing employees' right to discuss unionization and other Section 7 matters while using their employer's property. 324 U.S. at 801, 803. The Court acknowledged that the employers have relevant property interests, but stressed that such interests must often give way to employees' Section 7 rights. *Id*. at 797-98, 802 n.8. The Court has, however, limited the right of nonemployee communications are involved. *See Lechmere, Inc. v. NLRB* 502 U.S. 527, 531-32 (1992) (holding that in contrast to employees' direct Section 7 right to communicate, nonemployees have only an indirect right). In considering *Purple Communication* and *Registered Guard*, the Board is deciding directly on employee rights, not nonemployee rights. Therefore, *Republic Aviation* directly controls the decision of the Board in this case and requires adherence to the *Purple Communications* framework.

B. The employer property interests addressed in *Registered Guard* do not justify overruling *Purple Communications* and are not impacted by employee use of such systems for Section 7 communications.

It is also important to note that the Respondent, and the General Counsel, greatly overplay the impact on employers by forcing them to allow employees to communicate regarding Section 7 issues on non-working time. Respondent and General Counsel seek to conflate personal and real property rights as if they are the same and treated the same way. Case law clearly disagrees with this approach. First, the concept that employers need the ability to restrict employees' email usage to preserve server space, protect against computer viruses and dissemination of confidential information, and avoid company liability for employees'

inappropriate emails. *Registered Guard*, 351 NLRB at 1114. However, there was no evidence to support that employee use of employer e-mail systems for Section 7 communications impaired business operations.

Unlike physical invasions of real property, electronic communications are not physical invasions and will almost never interfere with the use of that system. The Respondent and General Counsel imply that *Purple Communications* has allowed the deterioration of work productivity because they are now subject to massive volumes of e-mails by employees on non-working time. There is simply no evidence to support such an implication. The use of employer e-mail systems to discuss Section 7 rights on non-working time is not disruptive to work productivity. Instead, it is likely to assist in ensuring a more productive workforce with issues that arise at work being addressed in a prompt manner.

Additionally, the concerns raised by the Board in *Registered Guard* are not protected by *Registered Guard* and are not jeopardized by *Purple Communications*. Inappropriate e-mails that warrant lawful discipline are not Section 7 activities. The disclosing of lawfully defined confidential information by an employee is not a Section 7 activity. Section 7 communications bring no more risk to viruses or jeopardizing server space than communications made solely for business purposes. These are perceived issues, not actually issues. If they were, there would be empirical evidence supporting such claims. There isn't.

C. The Board must overrule other standing precedent to return to *Registered Guard* and would place American workers in jeopardy of adverse employment actions while attempting to ascertain where their Section 7 rights begin and end.

The Board must overrule other standing Board precedent to return to *Registered Guard* and would place American workers in jeopardy of adverse employment actions while attempting to ascertain where their Section 7 rights begin and end. The Board also has standing precedent

finding that rules that explicitly restricts Section 7 rights are unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Even where rules don't explicitly restrict Section 7 conduct can be found to be unlawful if employees would reasonably construe the rule to do so. *Id*. at 647; *Hyundai American Shipping Agency*, 357 NLRB 860, 861 (2011); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf'd* 203 F. 3d 52 (D.C. Cir. 1999). The Board has also stated that where "an employer . . . that permits some, but not all, nonbusiness email usage risks violating the Act if its restrictions are overbroad or ambiguous (i.e., leaving employees guessing at their peril what portion of their protected conduct was permitted). *See Costco Wholesale Corp.*, 358 NLRB 1100, 1101 fn. 6 (2012)." *Hyundai* 357 NLRB at 862.

Should the Board overrule *Purple Communications* and return to *Registered Guard* or a similar standard and attempt to create exceptions to that standard, the Board will place employees in jeopardy by forcing them to be test cases to determine what carveouts may or may not be acceptable. Unlike when an employer chooses to be a test case and voluntarily funds the litigation that follows it, employees attempting to exercise their Section 7 rights will be forced into a situation where they are disciplined – or possibly fired – for such conduct and forced to undergo financial and reputational harm while their case works its way through the system. The Board should not put the American workforce in this situation without substantial justification for doing so.

II. THE NLRB SHOULD NOT EXPAND ITS HOLDING BEYOND EMPLOYER E-MAIL SYSTEMS WITHOUT GOING THROUGH THE RULEMAKING PROCESS

The Board should not expand its holding beyond employer e-mail systems without going through the rulemaking process. The fourth question poised in the Board's August 1, 2018, decision in this case refers to the "policy at issue" in this case and then questions whether or not

the Board should extend this policy – whether maintaining *Purple Communications* or returning to *Registered Guard* – beyond the current holdings to only employer e-mail systems. What is concerning about this question is that the "policy at issue" is not simply a policy. It is established Board precedent in which the current framework fits longstanding Supreme Court precedent like a glove. It is not simply a policy that went through the rulemaking process. It was established within the scope of the case in *Purple Communications* and maintained respect for the holding being limited to employer e-mail systems. The Board could have expanding the scope of that decision. But it didn't.

The Board now broadcasts that it wants to consider going beyond the scope of the case currently before it and broadly applying the decision it reaches beyond the confines of this case. This *Amicus* agrees with the dissenting members Pearce and McFerran that such an expansion of the holding of *Purple Communication* or *Registered Guard* should be done through the rulemaking process, not the adjudication process. Such a question is appearing for the first time with only a few short months for public input to be considered. While this *Amicus* clearly supports the opportunity to weigh in on the adjudication process, it strongly supports a broader, more thorough process to consider expansion of the holding in this case. The joint-employer standard and the regulations regarding conduct of elections are both going through the rulemaking process. This should follow that same process.

CONCLUSION

For all of the reasons stated above, the *Amicus* believes that *Purple Communications* should be retained as Board precedent, the Board should not return to *Registered Guard* or a similar standard, and the expansion of the scope of application should only be done through agency rulemaking.

CERTIFICATE OF SERVICE

The *Amicus* certifies that on October 5, 2018, a copy of the above and foregoing was electronically served on the parties and their counsel of record in this case via the Clerk of the National Labor Relations Board.

/s/William R. Lawrence IV
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